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**UNITED STATES DISTRICT COURT**

**NORTHERN DISTRICT OF CALIFORNIA, SAN JOSE DIVISION**

CISCO SYSTEMS, INC.,

Plaintiff,

vs.

ARISTA NETWORKS, INC.,

Defendant.

CASE NO. 5:14-cv-5344-BLF (NC)

**CISCO'S OPPOSITION TO ARISTA'S  
MOTION *IN LIMINE* NO. 3 TO  
EXCLUDE GIANCARLO  
DECLARATION AND RELATED  
TESTIMONY**

Date: November 3, 2016  
Time: TBD  
Dept: Courtroom 3 - 5th Floor  
Judge: Hon. Beth Labson Freeman

1 Plaintiff Cisco Systems, Inc. (“Cisco”) hereby respectfully opposes Defendant Arista  
2 Networks, Inc.’s (“Arista”) Motion *in Limine* No. 3 to Exclude Giancarlo Declaration and Related  
3 Testimony (Dkt. 526, MIL No. 3 or “MIL 3”). All referenced exhibits are attached to the  
4 Declaration of John M. Neukom in Support of Cisco’s Oppositions to Arista’s Motions *in Limine*,  
5 filed herewith.

6 **I. INTRODUCTION**

7 The Court should reject Arista’s effort to exclude the 2003 fact declaration of Charles  
8 Giancarlo—Cisco’s former Chief Development Office and currently an Arista board member—  
9 because it is directly relevant to rebutting Arista’s defenses in this case. Arista contends that  
10 Cisco cannot prevail on its copyright infringement claims if it has allowed its copyrighted CLI  
11 user interface and related documentation to become an “industry standard” that competitors can  
12 freely use without permission. For example, Arista has cited the deposition testimony of Andy  
13 Bechtolsheim—a former Cisco executive and now Arista’s board chairman—to support Arista’s  
14 argument that [REDACTED]  
15 [REDACTED]. But Cisco’s 2003 copyright action against Huawei for infringing  
16 Cisco’s CLI user interface directly rebuts Arista’s argument. And the 2003 fact declaration that  
17 Mr. Giancarlo submitted in the Huawei litigation shows that Mr. Giancarlo, when he was at  
18 Cisco, knew the proprietary value of Cisco’s CLI user interface and played an instrumental role in  
19 Cisco’s efforts to stop Huawei from copying that interface by suing Huawei for copyright  
20 infringement.

21 **II. FACTUAL BACKGROUND**

22 Arista intends to argue at trial that Cisco may not assert copyright protection for its  
23 asserted works because Cisco allegedly has permitted others in the industry to copy them without  
24 consequence. *See, e.g.*, Dkt. 65 at p.1 (“Until December 2014, Cisco never suggested that it  
25 claimed copyright protection in the set of functional commands that most of the industry uses.”).  
26 For example, Cisco’s Interrogatory No. 10 asked Arista to “[e]xplain in detail all factual and legal  
27 bases for any contention by You that You have not infringed Cisco’s copyrights[.]” In response,  
28 Arista has contended that it is not liable for copyright infringement because [REDACTED]

1 [REDACTED]  
2 [REDACTED] Dkt. 530-15 at 8; *See also id.* at  
3 138-39; 146; 190 [REDACTED]  
4 [REDACTED] (emphasis added). To support that argument, Arista has cited  
5 testimony of Mr. Bechtolsheim—like Mr. Giancarlo, a former Cisco executive and current Arista  
6 board member. *Id.*

7 Cisco’s lawsuit against Huawei, and Mr. Giancarlo’s declaration in that case while he was  
8 at Cisco, directly refute Arista’s argument. Cisco filed a lawsuit against Huawei in 2003 claiming,  
9 among other things, that Huawei infringed Cisco’s copyrighted CLI user interface, including  
10 multi-word command expressions. *See, e.g.*, Exh. 3 at ¶ 1 (alleging that Huawei “copied the  
11 copyrighted user interface for Cisco’s routers”); ¶ 12 (alleging “systematic copying of Cisco’s  
12 copyrighted Command Line Interface”); ¶ 15 (alleging that “[a] key component of the copyrighted  
13 IOS Software Programs is the ‘Command Line Interface’”); ¶ 16 (“Cisco’s CLI is a unique,  
14 expressive work that has been developed over many years of creative endeavor. Other  
15 manufacturers of network routers have their own command line interfaces that differ from Cisco’s,  
16 both in terms of the particular commands and in the organization of those commands.”); ¶ 17  
17 (presenting a list of command expressions copied by Huawei to support Cisco’s claim for  
18 copyright infringement).

19 During the Huawei litigation, Mr. Giancarlo, then at Cisco, submitted a declaration under  
20 oath describing the importance of Cisco’s copyrighted user interface to its business in terms that  
21 refute Arista’s assertion that Cisco made that interface freely available to others in the industry.  
22 *See id.* at ¶¶ 8 (“A key component of Cisco’s copyrighted IOS programs is Cisco’s copyrighted  
23 ‘Command Line Interface’ (‘CLI’)... It consists of an elaborate structure of textual  
24 commands[.]”), 11 (“Huawei has engaged in wholesale theft and copying of Cisco’s intellectual  
25 property... According to Cisco’s allegations, that theft includes... the copying of Cisco’s CLI and  
26 the copying of Cisco’s copyrighted user manuals.”), 12 (“Cisco’s proprietary IOS is one of the  
27 company’s most valuable assets and a critical component of Cisco’s business. The same holds true  
28 for the CLI user interface implemented by the IOS. This interface, which is unique to Cisco, has

1 been developed over many years through the expenditure by Cisco of hundreds of millions of  
2 dollars.”).

3 At Cisco’s deposition in this case of Mr. Giancarlo, who is now an Arista board member,  
4 Cisco’s counsel questioned Mr. Giancarlo on the substance of his 2003 declaration but took care  
5 not to elicit any privileged information concerning his attorney-client communications while at  
6 Cisco. *See, e.g.*, Exh. 5 at 50:17-51:12 & 51:24-52:17 (asking the witness at the outset to refrain  
7 from disclosing anything based on prior communications with Cisco counsel).<sup>1</sup> After that  
8 deposition, Arista moved to compel production of certain privileged documents regarding the  
9 Huawei litigation by arguing that Cisco had waived any attorney-client privilege regarding Mr.  
10 Giancarlo’s participation in the Huawei case and/or that Cisco was attempting improperly to use  
11 privilege as a sword and shield. Dkt. 404 at 1-3; *see also id.* at 3-5 (Cisco’s response). Magistrate  
12 Judge Cousins *denied* that motion in its entirety, finding *inter alia* that Cisco had not waived any  
13 privilege by virtue of asking Mr. Giancarlo questions about his 2003 fact declaration in the  
14 Huawei case. Dkt. 412 at 15-16.

### 15 **III. ARGUMENT**

#### 16 **A. The Giancarlo Declaration Is Highly Relevant And Probative To Rebut** 17 **Arista’s Argument That Cisco Has Permitted Others To Copy Its CLI User** **Interface**

18 Arista intends to assert at trial, as a defense to Cisco’s copyright claims, that Cisco  
19 supposedly has not asserted copyright claims to stop others in the industry from using Cisco’s CLI  
20 and that Arista relied on Cisco’s supposed failure to protect its intellectual property. The  
21 Giancarlo declaration from Cisco’s Huawei litigation is clearly relevant and highly probative to  
22 rebut those assertions. Mr. Giancarlo’s declaration attests that, while at Cisco, he was personally  
23 aware of and instrumental in Cisco’s efforts to assert copyright protection over the CLI user  
24 interface, and swore under oath to the CLI user interface’s enormous value and the irreparable  
25 harm that would be inflicted on Cisco were it to be copied by a competitor. Arista has admitted  
26

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27 <sup>1</sup> *See also id.* at 52:18-53:19; 53:22-54:21; 56:17-21; 65:21-66:3; 101:10-102:18; 113:11-  
28 114:10; 124:5-21; 155:11-156:15; 157:16-158:6; 161:14-20.

1 that such board member testimony is relevant by citing the deposition testimony of Mr.  
 2 Bechtolsheim (who like Mr. Giancarlo is a former Cisco executive and a current Arista board  
 3 member) to support Arista's arguments to the contrary. Dkt. 530-15 at 191

4 **B. The Hearsay Rule Does Not Bar The Giancarlo Fact Declaration**

5 Arista argues (MIL 3 at 3-4) that the hearsay rule bars admission of the Giancarlo  
 6 declaration, even if it is relevant and probative. That is incorrect. *First*, the Giancarlo declaration  
 7 is not hearsay because Cisco does not intend to use it to prove the truth of the matter asserted in it.  
 8 Fed. R. Evid. 801(c)(2). For example, Cisco will not use the Giancarlo declaration to prove that  
 9 its CLI user interface is in fact proprietary and unique. Instead, Cisco intends to use the Giancarlo  
 10 declaration to show that a current Arista board member was aware of, and personally instrumental  
 11 to, prior efforts by Cisco to protect its proprietary CLI user interface from copying. *See Gonzalez*  
 12 *v. Sec'y of Dep't of Homeland Sec.*, 678 F.3d 254, 262 (3d Cir. 2012) (declaration was admissible  
 13 because where "the significance of an offered statement lies solely in the fact that it was made, no  
 14 issue is raised as to the truth of anything asserted, and the statement is not hearsay") *Second*, Mr.  
 15 Giancarlo will testify at trial, and Cisco should be permitted to use his sworn declaration from  
 16 2003 to impeach any inconsistent testimony he provides at trial, and the declaration would not be  
 17 considered hearsay in that context. Fed. R. Evid. 801(d)(1)(A). *Third*, even if the Giancarlo  
 18 declaration were hearsay, it is subject to an exception under Fed. R. Evid. 803(5) as pertaining to  
 19 matters Mr. Giancarlo "once knew about but now cannot recall well enough to testify fully and  
 20 accurately." [REDACTED]

21 [REDACTED] The declaration was also  
 22 "made or adopted by the witness when the matter was fresh in the witness's memory," and appears  
 23 "[a]ccurately [to] reflect[] the witness's knowledge" from the time of the declaration. Fed. R.  
 24 Evid. 803(5)(B)-(C). Thus, at a minimum, it may be read into the record even if not admitted as a  
 25 trial exhibit.

26 **C. Arista's Privilege & "Sword/Shield" Arguments Have Already Been Rejected**

27 Arista argues (MIL3 at 4-5) that Cisco may not adduce the Giancarlo declaration as  
 28 evidence in this case without waiving privilege for the Huawei litigation. That is incorrect. *First*,

1 Arista already made this same argument to Magistrate Judge Cousins, and he rejected it. Because  
 2 Arista never objected to that ruling, it cannot now ask this Court for a different ruling. FRCP  
 3 72(a). **Second**, even if Magistrate Judge Cousins had not already rejected this argument, it has no  
 4 merit. Mr. Giancarlo's declaration from 2003 was factual, based on his personal knowledge, and  
 5 sworn under penalty of perjury. Neither the factual declaration nor Cisco's intended use of it in  
 6 this case implicates "advice of counsel" as in Arista's inapposite case law authorities.<sup>2</sup>

7 Indeed, the only evidence that Arista cites to support its argument that Cisco waived  
 8 privilege by questioning Mr. Giancarlo about his declaration (MIL3 at 2-3, citing Giancarlo Depo.  
 9 at 114:11-115:10) just shows that Cisco did not elicit any testimony on privileged matters, and  
 10 was careful to confine Mr. Giancarlo's testimony to the factual subject matter of his 2003  
 11 declaration. *See* n.1, *ante* (providing citations). Cisco seeks to use a fact declaration, from a fact  
 12 witness, to rebut a set of factual arguments from Arista about what Arista was or was not aware of.  
 13 Nothing about that scenario implicates attorney-client privilege.

#### 14 **IV. CONCLUSION**

15 For the foregoing reasons, Cisco respectfully requests that the Court deny Arista's MIL  
 16 No. 3.

17 Dated: October 7, 2016

Respectfully submitted,

18 /s/ John M. Neukom

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24 <sup>2</sup> *See Columbia Pictures Television, Inc. v. Krypton Broad. of Birmingham, Inc.*, 259 F.3d  
 25 1186, 1196 (9th Cir. 2001) ("Feltner sought to rely on advice of counsel to demonstrate that his  
 26 infringement was not willful."); *see also Chevron Corp. v. Pennzoil Co.*, 974 F.2d 1156, 1162 (9th  
 27 Cir. 1992) (the party sought to avoid liability by arguing that it acted on "the advice of its lawyers"  
 28 and "upon the advice of our tax counsel"); *see also United States v. Amlani*, 169 F.3d 1189, 1195  
 (9th Cir. 1999) (party's claim was premised on allegation that, prior to the alleged attorney  
 disparagement, he "had a high opinion" of his counsel and "intended to hire him for... trial").

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